though not the registered proprietor, of the other half share which the first appellant sold to the second appellant in 1958.

The question for decision is not whether the half share in question was once registered in the name of Masuan bin Talib, or whether the plaintiff purchased it from Masuan. There are two questions, and two questions only, to be decided:

(1) Disregarding Tor Cheng Teng's half share, which is not in question, who was the registered proprietor of the other half share when the writ was issued?

(2) If the registered proprietor when the writ was issued was not the plaintiff, but X, was X proved to have been a party to any fraud or misrepresentation, or was the registration of X obtained by forgery or by means of an insufficient or void instrument?

These questions arise from the provisions of section 29A of the Johore Land Enactment, the first four subsections of which are as follows:

29A. (i) Notwithstanding anything elsewhere contained, the title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.

(iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void.

(iv) Nothing in sub-sections (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him.

(Subsection (v) is irrelevant).

The answer to question (1) is to be found in two places: in the evidence of the Assistant Collector, P.W. 2, where he says, in answer to the only question put to him in cross-examination (which was put by the second appellant), "In A.O. 3559 the land is registered in your name with Tor"; and in the evidence of the second appellant, where he says, in examination in chief, "I am now on the title as the owner". This evidence as to an existing state of affairs was not challenged, and the second appellant was not cross-examined on it. The learned trial Judge ought to have found as a fact that the second appellant was the registered proprietor of the disputed half share, a question to which he does not appear to have addressed his mind as he does not mention the second appellant in his judgment at all.

The answer to question (2) is that there is no evidence, indeed it was never pleaded, that the second appellant was a party to any fraud or misrepresentation. Fraud and misrepresentation were alleged against the first appellant and the learned trial Judge ordered that the allegation must be struck out, which amounts to a finding that it was not proved. Even if it had been proved, it would not have operated to defeat the title of the second appellant unless it was also proved that he was a party to the fraud and misrepresentation.

There was no evidence of any of the matters referred to in subsection (iii) of section 29A, nor could there have been without amendment of the statement of claim as they were not pleaded.

Section 29A was not mentioned anywhere in the proceedings nor does the learned trial Judge appear to have considered it. This is no doubt one of the unfortunate consequences of the appellants having been unrepresented.

I would allow the appeal and set aside the order of the 6th December, 1961. I would order that the respondent pay the taxed costs of the appellants here and in the Court below.

Appeal allowed.

Solicitors: *R. Ramason; Pillai & Co.*

AZRO v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.)
May 22, 1962]

[Penang — F.M. Criminal Appeal No. 11 of 1962]

Criminal Law and Procedure — Murder — Penal Code, s.302 — Defence of insanity — Whether direction of trial judge proper.

The appellant was convicted at Muar of murder in contravention of section 302 of the Penal Code. The only defence that was put forward at the trial was the defence of insanity and the only grounds of his appeal in this case were (a) the jury were not given a proper direction on the subject and (b) the judge would appear to have told the jury that subject to his direction and in applying his direction there was no evidence to which the tests laid down by him could be applied.

Held: (1) the trial judge's direction to the jury complied with what was said in *Baharom* v. *Public Prosecutor* (4); *R.* v. *Sodeman* (1) and *R.* v. *Carr-Briant* (2);

(2) the trial judge nowhere in the course of his direction ruled that as a matter of law there was no evidence on which the jury could bring in a verdict of not guilty on account of insanity. A mere expression of opinion that the evidence did not make out the defence of insanity did not amount to misdirection.

Cases referred to:—

(1) *R.* v. *Sodeman* [1936] 2 All E.R. 1138.
(2) *R.* v. *Carr-Briant* [1943] K.B. 607.
(3) *Chia Chan Bah* v. *The King* [1938] M.L.J. 147.
(4) *Baharom* v. *Public Prosecutor* [1960] M.L.J. 249.

COURT OF APPEAL.

A. Jayadeva for the appellant.

H. Sankey (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was convicted at Muar for murder in contravention of section 302 of the Penal Code. The offence was said to have been committed in the early morning of 8th August in a house in the village of Parit Raja near Batu Pahat.

It is unnecessary to discuss the facts at any great length because it was proved up to the hilt, and indeed never denied that the appellant killed a man named Mir Afzalshah by stabbing

him to death. It is clear that there was some sort of business arrangement between the parties. The appellant who had been in Singapore had just come back from there and was staying with the deceased and that at one o'clock in the morning he was found sitting astride the deceased and stabbing him to death. From the medical evidence it would seem that he inflicted some 20 stab wounds. The only other fact of which anything has been made is that when neighbours attempted to intervene the appellant bit one of them.

As has been said the killing was never denied. The only defence that was put forward at the trial was the defence of insanity and the only grounds of his appeal to this Court deal with the way that defence was dealt with at the trial.

Such medical evidence as there was, the evidence of a medical functionary in the asylum to which the appellant was sent after his arrest, did not support that defence. It was argued, however, that that witness was speaking to a time about a month after the killing and that on the actual facts of the case the conduct of the appellant made out or at least could have made out the defence of insanity. There was no evidence of motive; there was the very brutal and savage nature of the actual stabbing; and there was the act of the appellant, who was no doubt in a very excited state of mind at that time, in biting one of the people who tried to intervene. It may well be that these circumstances would justify one, speaking loosely and colloquially, in saying that the appellant behaved like a mad man.

That, however, was not the question before the Court. The question was whether the case came within section 84 of the Penal Code which reads as follows:—

"Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind" (I emphasize these words: 'by reason of unsoundness of mind') "is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

In other words that section requires that there must be unsoundness of mind and that it must lead to one of two consequences, either that the accused person is incapable of knowing the nature of his act or that he is incapable of knowing that what he is doing is either wrong or contrary to law.

Now the way in which that defence is to be approached has been considered again and again in the Courts. In the English Courts the most important case is the case of *R.* v. *Sodeman* [1] which was later exegesised in the case of *R.* v. *Carr-Briant* [2]. In the Straits Settlements the matter was considered in the case of *Chia Chan Bah* v. *The King* [3] and in this Court it was considered as recently as 1960 in the case of *Baharom* v. *Public Prosecutor* [4]. The authorities would seem to be unanimous in that it is for the accused person to bring his case within the terms of that defence and that, subject to a proper direction by the Judge, it is for the jury to say whether he has done so.

In this Court the grounds of appeal are first, that the jury were not given a proper direction on the subject and in the second place that the Judge would appear to have told the jury that subject to his direction and in applying his direction there was no evidence to which the tests as laid down by him could be applied.

In our view both these grounds of complaint are without adequate foundation.

What the Judge said was this (I am reading from p. 25):—

". . . . . if the accused satisfies you on the preponderance of probabilities that at the time he committed the offence by reason of unsoundness of mind he was incapable of knowing the nature of the act or, if he did know the nature of his act, that he did not know what he was doing was wrong or contrary to the law, then of course you must bring in a verdict of not guilty by reason of insanity."

We are unable to distinguish what is said in that passage from what was said by Sir Percy McElwaine in the Straits Settlements Court of Appeal in the case of *Chia Chan Bah* v. *The King, supra*. What he said was this:—

"In a trial for murder it is incumbent on the Crown to prove beyond reasonable doubt that the accused killed the deceased by an act which constitutes murder within the meaning of section 300 of the Penal Code. Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106 (*sic.*) of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he tip the scale of probability in his favour — if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he really was insane. As it is put in *Rex* v. *Sodeman* the onus on an accused in setting up such an exception as insanity is no higher than the onus on a plaintiff or defendant in a Civil Suit."

That case, it is to be observed, was decided in 1938, that is two years after *Sodeman's case* and about five years prior to *Carr-Briant's case* in which, as has been said, the Court of Criminal Appeal emphasized and exegesised what was said previously in *Sodeman's case*. Returning to this country, the same Judge, Mr. Justice Adams, in the case of *Baharom* v. *Public Prosecutor, supra*, directed the jury in terms which are virtually indistinguishable from the terms used in the present case. In the subsequent appeal we said that in our view what the Judge said amounted to just what was said in *Sodeman's case* and later in *Carr-Briant's case*. So much for the first ground of appeal.

As regards the second ground of appeal, it is probably sufficient to say that the Judge nowhere ruled as a matter of law that there was no evidence on which the jury could bring in a verdict of not guilty on account of insanity. If he did so rule his ruling could probably have been successfully attacked; but he did not so rule. He did not withhold the issue from the jury although he did express his own views as to such evidence as there was. He had dealt with the

evidence as a whole at some length and said that such evidence as there was, particularly, having particular regard to the medical evidence, did not make out the defence of insanity. That expression of opinion may or may not have carried weight with the jury. It is, however, well-settled that unless he expresses himself in extreme and dogmatic terms, which was not done in this case, a Judge is entitled if he thinks such a course necessary for the guidance of a jury to express his own personal views regarding the evidence so long as he makes it clear that it is his own view which he is expressing and that the jury are not bound to accept it.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Jayadeva & Zahir.*

HASSAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Syed Sheh Barakbah J.) June 4, 1962]

[Alor Star — Kedah Criminal Appeal No. 104 of 1961]

Criminal Law and Procedure — Recall of prosecution witness by accused — Criminal Procedure Code (Cap. 6), s.173(j) — Burden of proof — Misdirection.

The accused was charged and convicted by the President of the Sessions Court for an offence punishable under section 3(c) of the Prevention of Corruption Ordinance. On appeal it was argued for the appellant that: (1) the learned President was wrong in law in refusing the application of the defence counsel to recall certain prosecution witnesses during the course of the trial, (2) the learned President misdirected himself on the question of the burden of proof.

Held: (1) the defence should be accorded the right to recall the prosecution witnesses unless the application was frivolous or vexatious; otherwise it would occasion a failure of justice. *Ong Boon Siang & Ors.* v. *R.* (1) followed;

(2) the learned President misdirected himself on the burden of proof. It is for the prosecution to prove their case beyond reasonable doubt and not for the accused to prove his innocence.

Case referred to:—

(1) *Ong Boon Siang & Ors.* v. *R.* [1961] M.L.J. 4.

CRIMINAL APPEAL.

D. R. Seenivasagam for the appellant.

Abdul Kadir bin Yusoff (Deputy Public Prosecutor) for the respondent.

Syed Sheh Barakbah J.: This is an appeal by the appellant against the conviction and sentence of 4 months' imprisonment passed on him by the learned President of the Sessions Court, Sungei Patani.

The charge is as follows:—

"That you between 28.4.60 and 22.5.60, at the Forest Checking Station, Sik, in the District of Gurun, in the State of Kedah, being an agent, namely a Forester, employed by the Government of the Federation of Malaya, in the Forest Department, Kedah, did knowingly use with intent to deceive your principal, certain documents to wit, 6 Timber Removal Passes in respect of which, the principal is interested and which contain statements that they were issued in respect of timber removed by one Tham Chew Chee Cheang which statement is false in material particular and which statement to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under section 3(c) of the Prevention of Corruption Ordinance, 1950."

The facts of the case have been fully set out by the learned President in his grounds of judgment and I therefore need not go through them in detail. The brief facts are as follows:

PW1 had no licence to fell timber in April and May 1960. In that period he took timber out through the Forest Checking Station where appellant worked as officer-in-charge. Dues were paid to the appellant for the timber taken out. PW1 used two lorries to transport the timber driven by PW3 and PW4. The appellant issued removal passes to these drivers not in the name of PW1 but in the names of other licensees including Tan Sue Chee Chong (PW8). PW8 had given permission to PW9 to renew his licence under his name. Neither PW8 nor PW9 gave permission to the appellant or anyone else to use PW8's name for timber removal by PW1. Two other licensees, PW12 and PW13 were also mentioned in the removal passes issued by the appellant to PW3 and PW4. They also did not give permission to use other names on the passes. The removal passes were signed by the appellant.

On August 20, 1960, PW1 made a report to the police stating that the appellant had demanded $240 as coffee money, failing which he would not be allowed to take out timber. Subsequently he gave $240 marked notes given to him by the police to the appellant. The appellant took only $100 asking PW1 to keep the balance as he was hard up and the timber had not been brought out yet. The police then arrested the appellant and found marked notes on his person. The appellant made a cautioned statement to the police stating that the money was in payment of a loan made by him to PW1.

There were five grounds of appeal. During the course of the hearing the learned counsel for the defence abandoned grounds (a), (b) and (c) leaving only grounds (d) and (e), namely —

(d) "The learned President was wrong in law in refusing the application of defence counsel to recall certain prosecution witnesses during the course of the trial. The right to recall is absolute and the failure of the learned President to allow this is fatal to the trial and the conviction and sentence therefore cannot stand."

(e) The learned President has misdirected himself on the question of burden of proof in criminal cases and has in fact required the defence to prove their innocence."

I shall deal with ground (e) first. In his judgment at page 36, para. B, last two lines, the President states —

"Obviously, accused is abetting the illegal transaction of PW1, and there being no corroboration of his evidence it must be accepted with suspect."

From this it would appear that the learned President was placing the burden on the appellant. In my opinion the learned President has misdirected himself as in all criminal cases it is for the prosecution to prove their case beyond reasonable doubt because there is a presumption in law that every man is innocent and that if he